

Plaintiffs Kansas City Power & Light Greater Missouri Operations Co. (“GMO”), Golden Bear Hydro, Inc. (“Golden Bear”), G.B. Hydro Partners Limited Partnership (“GBH”), and Energia, Inc. (“Energia”) (collectively, “Plaintiffs”) filed a five-count Petition against

Defendants asserting claims of breach of contract, breach of fiduciary duty (two counts), fraudulent omission, and civil conspiracy arising out of the purchase of a partnership's ("Mega Renewables" or the "Partnership") debt obligation by one of the limited partners of a general partner of Mega Renewables, and the failure of that limited partner to pass the discount he obtained on the note along to Mega Renewables. As is more fully set forth in Defendants' Suggestions in support of the Motion, the Petition should be dismissed on the following grounds:

1. Plaintiffs Lack Standing. Plaintiffs GMO, Golden Bear, and Energia lack standing to prosecute the claims set forth in the Petition because none of those Plaintiffs were parties to the Partnership Agreement, nor were they intended third party beneficiaries of the Agreement. *See Baldwin v. Marina City Properties, Inc.*, 79 Cal.App.3d 393, 406 (1978); *Kammerer v. Millenium WDG/Retail Partners*, 2002 WL 1064528, at \*10-11 (Cal. Ct. App. May 29, 2002); *Madison Realty Partners 7, LLC v. ISA P'ship Liquidity Investors*, 2001 WL 406268, \*5 (Del. Ch. Apr. 17, 2001). All of the Plaintiffs further lack standing to sue because the claims set forth in the Petition belong to the Partnership, and cannot be brought by the individual partners. *See* Cal. Corp. Code § 16405(a); *Mayer v. Driver*, 98 Cal.App.4<sup>th</sup> 48, 60 (2002); *Tinseltown Video, Inc. v. Transportation Ins. Co.*, 61 Cal.App.4<sup>th</sup> 184, 200 (1998); *In re Weksel*, 130 A.D.2d 640, 641 (N.Y. Sup.Ct. App. Div. 1987) (applying California law); *In re Balizan-Diaz*, Case No. 04-1159 S, slip op. at 22-25 (Bankr. D.N.M. Mar. 16, 2005).

2. Plaintiffs Fail to Adequately State a Claim For Relief. Plaintiffs' breach of contract claim against Defendant Carl Berg fails because Plaintiffs fail to adequately plead (i) their own performance or excuse for nonperformance, and (ii) any breach by Carl Berg. *See Baldwin*, 79 Cal.App.3d at 406 (affirming dismissal of non-partners' action alleging breach of partnership agreement); *Madison Realty Partners 7*, 2001 WL 406268, \*5, \*8 (dismissing breach

of partnership agreement claim by non-signatory affiliates of partner). Plaintiffs' breach of fiduciary duty claims fail to adequately allege the existence of a fiduciary duty. *See* Cal. Corp. Code § 16404; *Baldwin*, 79 Cal.App.3d at 406; *AB Group v. Wertin*, 59 Cal.App.4<sup>th</sup> 1022, 1028, 1033 (1997); *Skone v. Quanco Farms*, 261 Cal.App.2d 237, 241 (1968). Plaintiffs further fail to state a claim for fraudulent omission because they do not adequately allege that Defendants had a legal duty to disclose information, nor do they allege justifiable reliance on any alleged material omission. *See Buckland v. Threshold Enterprises, Ltd.*, 155 Cal.App.4<sup>th</sup> 798, 806-07 (2007). Finally, Plaintiffs' civil conspiracy claim fails because each of Plaintiffs' underlying tort claims requires dismissal. *See, e.g., Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4<sup>th</sup> 503, 511 (1994); *Richard B. LeVine, Inc. v. Higashi*, 131 Cal.App.4<sup>th</sup> 566, 574 (2005).

3. Plaintiffs' Claims Are Time-Barred. As set forth and defined in Defendants' Suggestions in support of this Motion, Plaintiffs' "Purchase Claim" and "Discount Claim" theories of recovery are time-barred because the causes of action relating to those theories accrued, at the latest, no later than May 1998, and the longest potentially applicable statute of limitation on any of Plaintiffs' claims would have expired by May 2003.

4. This Is an Improper Forum Under 28 U.S.C. § 1391(a). Neither the subject matter nor the "events or omissions giving rise" to Plaintiffs' claim arose in the Western District of Missouri, and thus venue is not proper in this district under 28 U.S.C. § 1391(a)(2). *See Woodke v. Dahm*, 70 F.3d 983, 985 (8<sup>th</sup> Cir. 1995); *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371-72 (11<sup>th</sup> Cir. 2003); *Barber v. Simpson*, 94 F.3d 648 (8<sup>th</sup> Cir. 1996); *Apollo Products, Inc. v. Marino*, 2006 WL 1798250, at \*3 (W.D.Mo. June 28, 2006). Because the Northern District of California would have been a proper forum for this lawsuit to have been brought under 28 U.S.C. §

1391(a)(1), the case should either be dismissed, or transferred to that district under 28 U.S.C. § 1406(a).

5. Alternatively, the Case Should Be Transferred Under 28 U.S.C. § 1404(a). In the event the Court finds that venue is proper in this district, Defendants alternatively request that venue be transferred to the Northern District of California for the convenience of the parties and witnesses, and in the interest of justice.

### **CONCLUSION**

For the reasons set forth above, as well those set forth in Defendants' Suggestions in support of this Motion, Defendants Carl E. Berg and Clyde J. Berg respectfully request an order from this Court dismissing Plaintiffs' Petition in its entirety, with prejudice, and granting Defendants all other relief to which the Court deems them entitled. Alternatively, Defendants request an order transferring this case to the Northern District of California.

### **REQUEST FOR ORAL ARGUMENT**

Pursuant to Local Rule 7.1(g), Defendants respectfully request oral argument on this Motion.

Respectfully Submitted,

LEWIS, RICE & FINGERSH, L.C.

By: /s/ Thomas M. Martin  
Thomas M. Martin MO Bar # 38811  
Joseph E. Bant MO Bar # 61145  
1010 Walnut, Suite 500  
Kansas City, Missouri 64106  
TEL: (816) 421-2500  
FAX: (816) 472-2500  
Email: [tmmartin@lrf-kc.com](mailto:tmmartin@lrf-kc.com)  
Email: [jebant@lrf-kc.com](mailto:jebant@lrf-kc.com)

ATTORNEYS FOR DEFENDANTS  
CARL E. BERG & CLYDE J. BERG

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by first-class mail, postage prepaid, and via the Court's ECF system on this 16th day of July 2010, upon:

Todd P. Graves  
David L. Marcus  
Graves Bartle Marcus & Garrett, LLC  
1100 Main Street, Suite 2700  
Kansas City, Missouri 64105  
**Attorneys for Plaintiffs**

/s/ Thomas M. Martin  
Attorney for Defendants

F:\LRF\Nelson\KC Power & Light v. Berg\Defendant Motion to Dismiss.docx